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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 851

ROWAN COTTON MILLS COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

J. GILMER KORNER, JR.,
Counsel for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

The petitioner, Rowan Cotton Mills Company, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fourth Circuit entered in the above cause on January 10, 1944, affirming in part the decision of The Tax Court of the United States.

Opinions Below.

The opinion of The Tax Court of the United States is reported in 1 T. C. 865 (R. 22). The opinion of the court below is reported in 140 F. (2d) 277 (R. 72).

Jurisdiction.

The judgment of the court below was entered January 10, 1944 (R. 80). The jurisdiction of this Court is invoked

under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Statutes Involved.

These are set forth in the Appendix to this Petition, p. 14.

Statement of the Case.

The Revenue Act of 1926 (44 Stat. 9) conferred on the Commissioner of Internal Revenue the right to determine income tax deficiencies, and provided the manner in which that right should be exercised.[1] The same Act prescribed a limitation on that right. The statute said:

> Sec. 274. (f) If after the enactment of this Act the Commissioner has mailed to the taxpayer notice of a deficiency as provided in subdivision (a), and the taxpayer files a petition with the Board within the time prescribed in such subdivision, the **Commissioner shall have no right to determine any additional deficiency in respect of the same taxable year** * * *. (Emphasis supplied.)

That section has remained unchanged down to the present date.[2]

The Senate Finance Committee Report on the 1926 Revenue Bill, S. R. No. 52, 69th Cong. 1st Sess., pp. 37-38, speaking to the above section, said:

> But if he does elect to file a petition with the Board **his entire tax liability for the year in question** (except in case of fraud) is finally and completely settled by the decision of the Board * * *. Finality is the end

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[1] Sec. 274 of Revenue Act of 1926.

[2] 1928 Act, sec. 272(f); 1932 Act, sec. 272(f); 1934 Act, sec. 272(f); 1936 Act, sec. 272(f); 1938 Act, sec. 272(f); 1939 I. R. C., sec. 272(f).

sought to be attained by these provisions of the bill * * *. (Emphasis supplied.)

Treasury Regulations 69, Art. 1232 (promulgated under the 1926 Act) interpreted the law:

Art. 1232. Assessment of a deficiency.—

(5) * * * If the Commissioner mails to the taxpayer notice of a deficiency and the taxpayer files a petition with the Board, **the Commissioner is barred** from determining **any additional deficiency** for the same taxable year except in the case of fraud and except as provided in section 279.[3] (Emphasis supplied.)

The Regulations point to the only exceptions to the prohibition.

Every income tax Treasury Regulation since that date has contained the same interpretation.[4]

In light of the above legislative history, and prior to 1936, a number of court decisions affirmed and explained the principle and objective of the statute and regulations.[5]

In light of the prior re-enactments of the statute without change, and of the legislative history, and of the Regulations and Court decisions, on June 2, 1936, the Congress enacted the Revenue Act of 1936 (49 Stat. 1648) and in that Act imposed certain **additional income taxes.**

Among these additional income taxes were those designated as "Unjust Enrichment Taxes" or "Windfall Taxes".

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[3] Sec. 279 relates to "jeopardy assessments".

[4] Reg. 74, Art. 1171 (1928 Act); Reg. 77, Art. 1171 (1932 Act); Reg. 86, Art. 272-1 (1934 Act); Reg. 94, Art. 272-1 (1936 Act); Reg. 101, Art. 272-1 (1938 Act); Reg. 103, Sec. 19.272-1 (Int. Rev. Code); Reg. 111, Sec. 29.272-1 (Oct. 28, 1943).

[5] Among such decisions are: *Bankers Reserve Life Co.* v. *U. S.*, 44 F. (2d) 1000 (1930), cert. den. 283 U. S. 836; *Com'r* v. *Wilson*, 60 F. (2d) 501 (1932), aff'g 23 B.T.A. 644; *Skaneateles Paper Co.*, 29 B.T.A. 150 (1933). The principle was also vigorously restated on April 20, 1943, in *Agnes McCue*, 1 T. C. 986, bot. 987.

They were imposed by sec. 501, Title III of the 1936 Act. Sec. 503 of that Act (now sec. 702, I. R. C.) provided:

> Sec. 503(a). All provisions of law (including penalties) applicable with respect to taxes imposed by Title I of this Act, shall, insofar as not inconsistent with this title, be applicable with respect to the taxes imposed by this title * * *.

Title I, above referred to, contains sec. 272(f) hereinabove quoted.

Pursuant to the 1936 Act, the Department promulgated Treasury Regulations 94, **governing determination of income tax deficiencies under that Act** and, in Art. 272-1, said:

> If the Commissioner mails to the taxpayer notice of a deficiency, and the taxpayer files a petition with the Board within the prescribed period, the Commissioner is barred from determining any additional deficiency for the same taxable year * * *.

That was the Regulation which had obtained for a prior period of ten years, as above noted.

The Internal Revenue Code comprehends all the taxes entitled "Internal Revenue Taxes". It subdivides those taxes into taxes over which the Board **has** jurisdiction and those over which the Board does **not** have jurisdiction. Subtitle A of the Code embodies all those "Taxes subject to the Jurisdiction of the Board of Tax Appeals" and then lists them (p. 1f) as follows:

Chapter 1. Income Tax ..... p. 1
Chapter 2. **Additional Income Taxes** p. 104
Chapter 3. Estate Tax ..... p. 118
Chapter 4. Gift Tax ..... p. 144

Chapter 2 of the Code (p. 104) is entitled "Additional Income Taxes" and in that chapter are listed the following **"Additional Income Taxes"**:

> Personal Holding Company Tax.
> Excess-Profits Tax.

Excess-Profits Tax on Navy Contracts.
Unjust Enrichment Tax.

The Chapter of the Code devoted to Income Tax contains the basic administrative enactments, and contains the basic jurisdictional and procedural provisions.

The Chapters devoted to "**Additional Income Taxes**"[6] contain no jurisdictional or procedural provisions except by reference to the jurisdictional and procedural sections of the basic enactments in the "income" Chapter.

On May 2, 1941, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, issued a document entitled "Internal Revenue Administrative Code."[7]

That Code proposed certain **changes** to be made in the law. The statement (at p. v) is as follows:

> The **changes** which each section of the Code **would make** in the corresponding section of the Internal Revenue Code are indicated by brackets and italics. Brackets signify that the matter enclosed therein is to be omitted, and **italics identify new matter.** (Emphasis supplied.)

One of the **changes** proposed by the Treasury Department to be made is found in Subchapter B entitled "Assessment and Collection of Deficiencies", and in that subchapter appears the following (brackets indicating omissions, and

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[6] Note the caption of each page of the Code on Unjust Enrichment Taxes—i.e., caption of pages 113, 115, 117.

[7] U. S. Government Printing Office, Washington: 1941. The document states (p. v): "The preparation of this Code was commenced in the Treasury Department in 1937 at the behest of Roswell Magill, then Under Secretary of the Treasury, and the late Herman Oliphant, then General Counsel for the Department. Roger J. Traynor, then consulting expert, assisted by John M. Maguire, then consulting expert, and Stanley S. Surrey, assistant legislative counsel, Treasury Department, supervised the work on this Code, which was performed by a staff of attorneys from the General Counsel's Office."

italics indicating **new matter constituting changes** which would be made in the law):

> **Sec. 2604. Restrictions on Assessment and Future Deficiency Notices.**
>
> (b) [(f)] FURTHER DEFICIENCY *NOTICES* [LETTERS] RESTRICTED.—If the Commissioner has mailed to the taxpayer [E-executor; G-donor] *a* notice of [a] deficiency [I, G-as provided in subsection (a) of this section; E-as provided in subsection (a)], and the taxpayer [E-executor; G-donor] files a petition with the Board within the time prescribed in *section 2603(a)* [such subsection], the Commissioner shall have no right *with respect to the same tax*[7a] to determine any additional deficiency *for the same taxable year* * * *. (Italics *not* supplied.)

The law was not changed, nor were the Regulations changed. The law was not amended so as to make it read as the respondent in the instant case (who was the one who proposed the *change* to be made) contends it should now be read.

Respondent now contends that the statutory prohibition against "any additional deficiency" means only "with respect to the same tax", thereby writing into the statute words which do not appear therein—and which change and amend both the language and the meaning of the statute.

The Unjust Enrichment Tax is an income tax. *Cincinnati Rubber Mfg. Co.*, 46 B. T. A. 453 (1942), and decisions below in the instant case.

In *Cincinnati Rubber Mfg. Co., supra*, the **taxpayer contended** that since the unjust enrichment tax is not included under Title I, Income Tax, but is under a separate title,

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[7a] *Added* to show clearly that the restriction as to the determination of an additional deficiency is limited to *the same tax for* which the previous deficiency was determined and for the same taxable year or, in the case of estate taxes, for the same transfer of net estate. (Italics supplied.)

Title III of the 1936 Act, it is a tax of a different character from the Income Tax.[8] The **respondent contended** that it was **not** a tax of a different character, but **was a tax of the same kind**, viz., an additional income tax. The **respondent** argued in his brief: "It is an additional Federal income tax based on net income from certain sources. The fact that it is captioned under a separate title * * * is immaterial. The reason that this tax was not interwoven with those imposed under Title I and IA is obvious. It is a tax administered by the Income Tax Unit of the Bureau and is in every material aspect an income tax"[9] (R. Append. B, p. 6-11).

The Board in its decision sustained the contention of the Commissioner and rejected the contention of the taxpayer. The decision below in the instant case is in direct conflict with that decision.

* * * * * * *

In light of all the foregoing, the following facts are to be considered:

Petitioner filed a timely income and excess profits tax return for the **year 1935.**

On June 15, 1937, petitioner filed its return of additional income taxes—unjust enrichment taxes.

On September 13, 1937, the Commissioner determined a deficiency in income and profits taxes in the respective amounts of $9,192.34 and $3,385.61, and mailed a statutory deficiency notice thereof to petitioner.

On December 10, 1937, petitioner filed a timely petition in the Board of Tax Appeals. Respondent filed answer on February 7, 1938, and raised an affirmative plea, claiming

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[8] The respondent now makes that contention in the instant case.

[9] The petitioner in the instant case makes the same contention that the Commissioner made in the *Cincinnati Rubber Mfg. Co.* case.

deficiencies in income and profits taxes in excess of those determined in the deficiency notice.

On May 27, 1938, the parties, after negotiations, entered into an "Agreement to Stipulate" which, inter alia contained the stipulation that:

> "It is also agreed and understood that the **petitioner's taxable net income for 1935** is $190,330.85 * * *.
>
> "All other issues are waived and no new issues are to be raised.
>
> "This settlement when approved shall definitely close the Federal income tax matters of Rowan Cotton Mills Company for the year 1935 * * *" (Ex. 16).

The settlement was approved and, pursuant to the above agreement, on June 24, 1938, the parties executed and filed a stipulation in the Board fixing the deficiencies in income and profits taxes for the year 1935 (in accordance with their agreement) at $14,863.52 and $5,447.86 respectively (Ex. 11).

On June 25, 1938, the Board entered its decision and Order fixing the deficiencies for the said year 1935 (Ex. 12). Neither party appealed the Board's decision and it became final in due course (R. top 44).

About three years later (on May 12, 1941) the Commissioner purported to determine an additional deficiency for the year 1935, and advised petitioner that this deficiency was for an Unjust Enrichment Tax imposed by Title III of the 1936 Act, and that such tax "**is in addition to all other taxes on net income**" (R. Appen. C., top p. 20). The Commissioner mailed a registered notice to petitioner proposing a tax deficiency of $33,969.97, and asserting a penalty of 20%, alleging that the Windfall Tax Return was not filed on time (R. 18-19).

Petitioner filed a timely appeal in the Board of Tax Ap-

peals and contended that the Commissioner had no right to determine any additional income tax deficiency for the same year 1935, under the circumstances. On June 2, 1942, petitioner filed motion in the Board that the hearing in this cause be limited, in the first instance, to the question of whether the Commissioner had the right to determine any additional deficiencies for the year 1935. The motion was granted (R. 21-22). The hearing was limited to that issue. Petitioner introduced evidence establishing the facts set out hereinabove. It introduced the Windfall Tax Return in evidence showing that it was filed on June 15, 1937,[10] and introduced in evidence a letter of the Collector of Internal Revenue, with whom that return was filed, showing that the extended time granted for filing such return was to June 15, 1937 (Ex. 15).

After the said hearing the case was restored to the general calendar for hearing on the issue as to the merits of the proposed tax deficiency. The taxpayer elected to stand on its plea to the right of the Commissioner, and of the Board, to determine any additional deficiency for the year 1935. A Division of the Board (then the Tax Court) concluded that the Commissioner was not barred from determining and assessing the deficiency, and entered an order deciding that there is a deficiency for the year 1935 in the amount of $33,969.97, plus a delinquency penalty of $6,793.99 (R. p. 22 and p. 29).

Petitioner appealed to the Circuit Court of Appeals for the Fourth Circuit. That court affirmed the decision of the Tax Court as to the deficiency in tax, but reversed and remanded the cause on the issue as to the penalty—which latter point is not involved in this Petition for Certiorari.

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[10] The Board found that it was filed on that date (R. Opinion by Judge Smith, top p. 26).

Questions Presented.

When the Commissioner has mailed to the taxpayer notice of a deficiency as provided in subsection (a) of section 272 [11] and the taxpayer has filed a petition with the Board within the time prescribed in such subsection, and the decision of the Board has become final in that appeal, has the Commissioner the right to determine any additional deficiency in income tax, under section 501 [12] in respect of the same taxable year?

Specification of Errors to Be Urged.

The court below erred:

1. In holding that the windfall tax, although an income tax, is a separate and distinct tax from the income tax.

2. In holding that the provisions of law, contained in sec. 272(f), with respect to taxes imposed by Title I of the statute, are not applicable and binding upon the Commissioner with respect to the taxes imposed by Title III of the statute.

3. In holding that the prohibition against the determination of any additional deficiencies in respect of the same taxable year, contained in sec. 272(f), do not prohibit the determination of a deficiency of additional income taxes, under section 501, in respect of the same taxable year.

4. In holding that the statute does not require that notice of determination of a deficiency in income taxes under Title I of the statute must also embrace notice of a determination of a deficiency in income taxes under Title III of the statute, or vice-versa.

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[11] Section 272 I. R. C.

[12] Section 701 I. R. C.

5. In holding that section 501 of Title III of the statute provides an administrative procedure for the determination of income taxes under that section, separate and distinct from, and independent of, the administrative procedure for the determination of income taxes under Title I of the statute.

6. In affirming the decision of The Tax Court and holding that the Commissioner had the right to determine an additional deficiency in income taxes under section 501 of the statute, notwithstanding that approximately four years previously he had mailed to the taxpayer notice of a deficiency in income taxes as provided in subsection 272(f), and that the taxpayer had filed a petition in the Board within the time prescribed in that subsection, and the Board's decision on that petition had become final; and in affirming the decision of The Tax Court that there is a deficiency in taxes in the amount of $33,969.97.

Reasons for Granting the Writ.

This case involves the judicial interpretation of a statute which, petitioner contends, is phrased in clear and unambiguous language.

Petitioner contends that the statute means exactly what it says. It says that when a deficiency notice has been mailed to the taxpayer and appeal taken therefrom to the Board, the Commissioner shall have no right to determine "any additional deficiency" in respect of the same year.

Petitioner contends that the clear wording of the section **cannot be construed** as if it read "* * * the Commissioner shall have no right **with respect to the same tax** to determine any additional deficiency for the same taxable year."

Petitioner contends that the decisions below construe the statute as if contained the added phrase "with respect to

the same tax". And the petitioner points to the fact that the Secretary and the Commissioner have recognized this fact by the change offered by them in their proposed Administrative Code, to which reference has been made. The proposal to insert that added phrase was accompanied by a note of explanation which stated that the phrase, "with respect to the same tax," was:

> "**Added** to show clearly that the restriction as to the determination of an additional deficiency is limited to the **same tax** for which the previous deficiency was determined and for the same taxable year * * *." (Emphasis supplied.)

Petitioner contends that the interpretation of that section as if it contained that added phrase is negatived, not only by the plain and unambiguous language of the statute itself, but also by the legislative history of the section, its interpretation by the Treasury Department for many years in Treasury Regulations, and that such interpretation is in conflict with other decisions of the Board and the Courts.

Petitioner contends that the Commissioner's action is in effect to amend the statute without legislative action and that this is a novel and test case for that purpose.

Petitioner contends that the interpretation of the section should be approached with no desire to construe legislation so as to accomplish that which may be deemed to be a worthy result, but in the desire to ascertain what Congress has enacted rather than what the Commissioner wishes it had enacted.

The question here is new and of general importance because this case is the first to define the right of the Commissioner on this point. The statute has not been construed by this Court in any similar case.

Since the statutory provisions have wide application, and since the question is therefore likely to recur frequently, it is

a matter of general importance in the administration of the revenue laws that the issue be authoritatively resolved.

Conclusion.

It is, therefore, respectfully submitted that this petition for a writ of certiorari should be granted.

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Attorney for Petitioner.

March, 1944.

APPENDIX.

Statutes Involved.

Sec. 272 of Internal Revenue Code: [13]

Sec. 272. (f) **Further Deficiency Letters Restricted.**—If the Commissioner has mailed to the taxpayer notice of a deficiency as provided in subsection (a) of this section, and the taxpayer files a petition with the Board within the time prescribed in such subsection, the Commissioner shall have no right to determine **any additional deficiency** in respect of the same taxable year, * * * (Emphasis supplied.)

Sec. 700 Internal Revenue Code: [14]

Sec. 700. Tax On Net Income From Certain Sources.

Sec. 700. (a) The following taxes shall be levied, collected, and paid for each taxable year (in addition to any other tax on net income), upon the net income of every person which arises from the sources specified below: * * *

Sec. 702, Internal Revenue Code: [15]

Sec. 702. Administrative Provisions.

Sec. 702. (a) All provisions of law (including penalties) applicable with respect to taxes imposed by chapter 1, shall, insofar as not inconsistent with this subchapter, be applicable with respect to the taxes imposed by this subchapter * * *.

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[13] Sec. 274(f) of 1926 Act; sec. 272(f) of 1928, 1932, 1934, 1936 and 1938 Acts.

[14] Sec. 501(a) of 1936 Act.

[15] Sec. 503(a) of 1936 Act.

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CITATIONS

Statutes:	
Revenue Act of 1934, c. 277, 48 Stat. 680:	
Sec. 271	6, 10
Sec. 272	5, 6, 7, 10
Revenue Act of 1936, c. 690, 49 Stat. 1648:	
Sec. 501	11
Sec. 502	7, 12
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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 851

ROWAN COTTON MILLS COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court of the United States (R. 22–32) is reported at 1 T. C. 865. The opinion of the Circuit Court of Appeals (R. 72–80) is reported at 140 F. 2d 277.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 10, 1944 (R. 80). The petition for a writ of certiorari was filed on April 6, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Commissioner is precluded by Section 272 of the Revenue Act of 1934 from asserting a deficiency in unjust enrichment tax for 1935 after the taxpayer's income and excess profits tax liability for that year has been finally settled by a decision of the Board of Tax Appeals.

STATUTES INVOLVED

The relevant statutory provisions are set forth in the Appendix, *infra*, pp. 10–14.

STATEMENT

The taxpayer is a North Carolina corporation, with its principal office and place of business at Salisbury, North Carolina. Its income and excess profits tax return and return for tax on unjust enrichment for the calendar year 1935 were filed with the Collector of Internal Revenue for the District of North Carolina. (R. 23.)

Taxpayer's income and excess profits tax return showed a net income of $82,232.48. The income tax and excess profits tax assessed thereon were in the amounts of $11,306.97 and $351.02, respectively. Under date of September 13, 1937, the Commissioner mailed to the taxpayer a notice of deficiency in income tax and excess profits tax for 1935 of $9,192.34 and $3,385.61, respectively. (R. 23.) Following an appeal by the taxpayer to the Board of Tax Appeals, the asserted deficiencies were increased to $15,812.26 and $5,792.86, respectively (R. 24).

There were numerous conferences between the taxpayer and representatives of the Commissioner relative to the correct income tax and excess profits tax liabilities for 1935 (R. 24). At these conferences, nothing was ever said by anybody about any liability of the taxpayer to "Tax on Unjust Enrichment" for 1935 under Title III of the Revenue Act of 1936 (R. 25).

Finally, an agreement was reached by the respective parties, based upon mutual concessions, and the following stipulation was filed with the Board of Tax Appeals on June 24, 1938 (R. 26):

> It is hereby stipulated and agreed that there is a deficiency in Federal income tax of $14,863.52 and a deficiency in excess-profits tax of $5,447.86 due from this petitioner for the taxable year 1935 and that the Board may enter its decision accordingly.

A decision to the above effect was entered by the Board under date of June 25, 1938, and the case was closed. The judgment, together with accrued interest less a related credit for overassessment of tax for 1936, was paid by the taxpayer on October 10, 1938, in the net amount of $14,637.38. (R. 26.)

In the meantime, the taxpayer's return for tax on unjust enrichment (Form 945) for the calendar year 1935 was filed on June 15, 1937. This return was filed pursuant to the provisions of Title III of the Revenue Act of 1936 and showed

no liability for such tax. No deficiency in tax on unjust enrichment had been determined by the Commissioner at the time of the conferences between the taxpayer and the Commissioner's representatives relative to the correct amounts of deficiencies in income tax and excess profits tax for 1935. (R. 26.)

When the Commissioner audited the taxpayer's return of tax on unjust enrichment for 1935 (filed June 15, 1937), he determined that the taxpayer had a liability of $33,969.97 for such tax, plus a penalty of $6,793.99 for delinquency in filing its return. The Commissioner mailed a notice of deficiency to taxpayer on May 12, 1941, and on July 14, 1941, the taxpayer filed its petition in the present proceeding. (R. 26–27.)

On June 2, 1942, the taxpayer filed a motion with the Board of Tax Appeals that the hearing in the first instance be limited to the question whether the Commissioner had authority to determine any deficiency in unjust enrichment tax for the year 1935 by reason of the fact that the taxpayer's income tax and excess profits tax liabilities for 1935 had been settled by the decision of the Board entered in Docket No. 91529 on June 25, 1938. The motion was granted on the date of filing and the evidence at the hearing on June 11, 1942, was limited accordingly. (R. 27.)

By order of the Board entered August 31, 1942, the case was restored to the general calendar for hearing upon all issues raised (R. 27).

On January 20, 1943, the taxpayer filed a "Motion and Plea" with the Tax Court electing "to stand on its plea to the jurisdiction either of the Commissioner or of this Court to find and determine any additional deficiency for the same said year 1935, and elects not to offer evidence on any other issue raised by the pleadings in this cause" (R. 27).

The Tax Court concluded that the Commissioner was not barred from asserting the deficiency in unjust enrichment tax (R. 32), and the Circuit Court of Appeals affirmed, except as to the penalty which is not here involved (R. 80).

ARGUMENT

The court below correctly ruled that the Commissioner was not precluded from determining a deficiency with respect to unjust enrichment taxes imposed under Title III of the Revenue Act of 1936 by reason of the fact that a deficiency of ordinary income taxes imposed under a different title had been finally approved by a decision of the Board of Tax Appeals. No conflict of authorities is asserted. The petition is predicated solely upon the alleged improper construction of a Section of a statute (sec. 272 (f) of the Revenue Act of 1934) to which the petitioner repeatedly refers without mentioning related Sections which are incorporated therein by reference.

The assertion is made (Pet. 11) that the Commissioner was barred by the language of Section

272 (f) of the Revenue Act of 1934 (Appendix, *infra,* pp. 10–11). But when Section 272 is read as a whole, it seems plain that Congress intended to restrict the issuance of further deficiency notices only with respect to the same type of tax, *i. e.,* "the tax imposed by this title," as specified in Section 272 (a) (Appendix, *infra,* p. 10).[1]

In Section 271 (a) (Appendix, *infra,* p. 10), a deficiency was defined as "The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return." Again in Section 272 (a), it was made clear that Congress was there dealing only with "a deficiency in respect of the tax imposed by

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[1] The petitioner relies upon the language of a tentative draft of a proposed administrative code as indicating that the administrative construction of the existing law is contrary to the position taken here and as suggesting a legislative change for the future (Pet. 5–6, 12). Apart from the fact that the draft is tentative only, the language relied upon carries no such implications. Under the tentative draft, the administrative provisions are rearranged so that a single Section (Section 2604) deals with deficiencies in all taxes. Inasmuch as Section 2604 (a) refers to sending deficiency notices as to gift, estate and various forms of income taxes, it was necessary to phrase Section 2604 (b) in order to make it clear that the prohibition against a second deficiency notice was directed against the same tax as the first deficiency notice. Far from indicating a proposed change in the law, Section 2604 reflects the administrative construction of the existing law. Administrative construction is of course indicated by administrative practice and, in practice, returns filed under Title III of the Revenue Act of 1936 were audited by separate units of the Bureau of Internal Revenue and separate deficiency notices were sent (R. 79).

this title." When Congress then provided in Section 272 (f) that if the Commissioner once issued a notice of deficiency "as provided in subsection (a) of this section," no further deficiency notice could be issued "in respect of the same taxable year," it was restricting further action relating to the same tax, *i. e.,* "the tax imposed by this title," as specified in Section 272 (a).[2] Congress was not thereby precluding timely action with respect to excise taxes under Title IV of the 1934 Act, or capital stock taxes under Title V thereof, even though the liability might relate to the same taxable year. It seems all the more obvious that Congress did not intend by that general Section (sec. 272 (f)) to curtail the Commissioner's timely action with respect to the special unjust enrichment tax which was not even enacted until June 27, 1936, and was then set forth in a separate title (Title III) which embodied the special features necessarily attributable to this special tax. See Sections 502, 503,[3] 504, and 506 of the Revenue Act of 1936 (Appendix, *infra,* pp. 12–14).

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[2] The same observations are true with respect to the regulation referred to on page 4 of the petition.

[3] Section 503, relied upon by the petitioner (Pet. 4), actually confirms the administrative construction. If, as the petitioner urges, taxes under Title III were to be merged with Title I taxes, it would have been unnecessary to make separate provision in Title III for administrative procedure by incorporating therein by reference the Title I provisions. The court below properly observed that (R. 78):

> The inclusion by Congress in Title III of the procedural provisions for the determination of deficiencies by refer-

The court below, in rejecting the petitioner's claims, made the following clarifying analysis (R. 77):

> These contentions, however, do not touch the point that the procedure prescribed in § 272 of the Revenue Act of 1934 relates to taxes imposed by Title I of the Act, that is, income and excess profits taxes, while the procedure for additional income taxes, such as the windfall tax is prescribed by Title III of the Revenue Act of 1936. Section 272 (f) of the 1934 Act refers to the notice of deficiency prescribed in § 272 (a) which in terms applies to "a deficiency in respect of the tax imposed by this title." The windfall tax, although in its nature an income tax, is a separate and distinct tax. It had no existence when the Revenue Act of 1934 was passed or when the taxpayer's income tax return for the year 1935 was filed.

The decision of the Tax Court, as affirmed by the Circuit Court of Appeals, is sound and is in complete harmony with administrative practice. In the absence of a conflict of authorities, there is no basis for the issuance of the writ.

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ence to the analogous provisions in Title I of itself suggests that the windfall tax is a separate and distinct tax for which it was necessary to provide administrative procedure.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APRIL 1944.

APPENDIX

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 271. DEFINITION OF DEFICIENCY.

As used in this title in respect of a tax imposed by this title "deficiency" means—

(a) The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; * * *

SEC. 272. PROCEDURE IN GENERAL.

(a) *Petition to Board of Tax Appeals.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 90 days after such notice is mailed (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. * * *

* * * * *

(f) *Further Deficiency Letters Restricted.*—If the Commissioner has mailed to the taxpayer notice of a deficiency as

provided in subsection (a) of this section, and the taxpayer files a petition with the Board within the time prescribed in such subsection, the Commissioner shall have no right to determine any additional deficiency in respect of the same taxable year, * * *

* * * * *

Revenue Act of 1936, c. 690, 49 Stat. 1648:

TITLE III—TAX ON UNJUST ENRICHMENT.

SEC. 501. TAX ON NET INCOME FROM CERTAIN SOURCES.

(a) The following taxes shall be levied, collected, and paid for each taxable year (in addition to any other tax on net income), upon the net income of every person which arises from the sources specified below:

(1) A tax equal to 80 per centum of that portion of the net income from the sale of articles with respect to which a Federal excise tax was imposed on such person but not paid which is attributable to shifting to others to any extent the burden of such Federal excise tax and which does not exceed such person's net income for the entire taxable year from the sale of articles with respect to which such Federal excise tax was imposed.

(2) A tax equal to 80 per centum of the net income from reimbursement received by such person from his vendors of amounts representing Federal excise-tax burdens included in prices paid by such person to such vendors, to the extent that such net income does not exceed the amount of such Federal excise-tax burden which such person in turn shifted to his vendees.

(3) A tax equal to 80 per centum of the net income from refunds or credits to such person from the United States of Federal excise taxes erroneously or illegally collected with respect to any articles, to the extent that such net income does not exceed the amount of the burden of such Federal excise taxes with respect to such articles which such person shifted to others.

* * * * *

SEC. 502. CREDIT FOR OTHER TAXES ON INCOME.

There shall be credited against the total amount of the taxes imposed by this title an amount equivalent to the excess of—

(a) The amount of the other Federal income and excess-profits taxes payable by the taxpayer for the taxable year, over

(b) The amount of the other Federal income and excess-profits taxes which would have been payable by the taxpayer for the taxable year if his net income were decreased by the amount of net income taxable under this title.

SEC. 503. ADMINISTRATIVE PROVISIONS.

(a) All provisions of law (including penalties) applicable with respect to taxes imposed by Title I of this Act, shall, insofar as not inconsistent with this title, be applicable with respect to the taxes imposed by this title, except that the provisions of sections 101, 131, 251, and 252 shall not be applicable.

(b) Every person (1) upon whom a Federal excise tax was imposed but not paid, or (2) who received any reimbursement specified in subsection (a) (2), or (3) who received a refund or credit of Federal excise tax, shall make a return under this title, which return shall contain such in-

formation and be made in such manner as the Commissioner, with the approval of the Secretary, shall prescribe. For any taxable year ended prior to the date of the enactment of this Act the return shall be filed, and the total amount of the taxes shall be paid, not later than the fifteenth day of the third month after the date of the enactment of this Act, in lieu of the time otherwise prescribed by law.

(c) If the Commissioner finds that the payment, on the date prescribed for the payment thereof, of any part of the amount determined by the taxpayer as the tax under this title, or of any deficiency with respect thereto, would impose undue hardship upon the taxpayer, the Commissioner may grant an extension for the payment of any such part for a period not in excess of three years. * * *

SEC. 504. TAXABLE YEARS TO WHICH TITLE IS APPLICABLE.

The taxes imposed by this title shall apply only with respect to taxable years ending during the calendar year 1935 and to subsequent taxable years.

* * * * *

SEC. 506. CLOSING AGREEMENTS.

Any person who is liable for the tax imposed by this title and who has filed any claim or claims for refund of any amount paid or collected as tax under the Agricultural Adjustment Act, as amended, may apply to the Commissioner of Internal Revenue for an adjustment of such liability for tax in conjunction with such claim or claims for refund, and thereafter, the Commissioner, for such purposes, may, in his discretion, consider such liability and such claim or claims as one case and, in his discretion, may enter into a written agreement

with such person for the settlement of such case by such payment by, or refund to, such person as may be specified in such agreement. Such agreement shall be a final settlement of the liability for tax and the claim or claims for refund covered by such agreement, except in case of fraud, malfeasance, or misrepresentation of a material fact. In the absence of fraud or mistake in mathematical calculation, any action taken or any consideration given by the Commissioner pursuant to this section shall not be subject to review by any court, or any administrative, or accounting officer, employee, or agent of the United States.

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